IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DISTRICT

IN RE:	§	CASE NO. 02-40665-DML-11
	§	
DENTON COUNTY ELECTRIC	§	(JOINTLY ADMINISTERED)
COOPERATIVE, INC. d/b/a	§	
COSERV ELECTRIC, et al.	§	
	§	
Debtors.	§	
	§	

MEMORANDUM OPINION

Before the court is Debtor's Motion to Approve Compromise and Settlement Agreement (Bright Farm Partnership/Proof of Claim No. 204) (the "Motion"). The Motion was objected to by National Rural Utilities Cooperative Finance Corporation ("CFC"). The court received evidence and argument on the Motion on September 9, 2003, and asked that the parties provide authorities in support of their respective positions. Debtor, CFC and Bright Farm Partnership ("Bright") all filed memoranda with the court. This matter is subject to this court's core jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2)(A), (B) and (O), and ¶¶ 14.1.1, 14.1.3 and 14.1.8 of the Joint Plan of Reorganization for Denton County Electric Cooperative, Inc. d/b/a CoServ Electric, CoServ Investments, L.P. f/k/a DCE Services, Inc. and CoServ Utility Holdings, L.P. (the "Plan"). This Memorandum Opinion constitutes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

I. Background

Debtor is a provider of electric utility services to portions of North Texas. On July 17, 1993, Debtor and Bright entered into an agreement (the "1993 Agreement") by which Debtor

agreed to provide electric utility service to certain property being developed by Bright. The 1993 Agreement superceded an earlier, 1985 agreement (the "1985 Agreement"). Among the obligations of Debtor under the 1993 Agreement was underground installation of certain power lines. Based on the tariffs under which Debtor operated in 1993, the cost of burying the power lines would be borne by Debtor.

On February 1, 2002, Debtor filed this chapter 11 case. CFC was Debtor's principal lender, and Debtor's chapter 11 filing was in part a result of disputes between it and CFC. At the time of filing, though Debtor was providing electric service to Bright's development, Debtor's obligations under the 1993 Agreement to bury power lines had not been performed.

After protracted negotiations, on May 2, 2002, Debtor and CFC entered into a compromise and settlement agreement. This agreement, filed with the court under seal, was general in terms. However, it contemplated Debtor and CFC would jointly file a plan of reorganization for Debtor which would, *inter alia*, provide for (1) 100% payment of unsecured claims by CFC; and (2) compromise and satisfaction of Debtor's indebtedness to CFC. These terms were embodied in the Plan (and associated documents) which was filed on June 24, 2002, and confirmed on September 11, 2002. The Plan does not provide that the claims of CFC will increase by reason of payments of funds supplied by it to unsecured creditors.

On September 10, 2002, Debtor filed a motion pursuant to 11 U.S.C. § 365(a) to reject certain executory contracts, including both the 1985 Agreement[1] and the 1993 Agreement.

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[1] The 1985 Agreement was included by Debtor though superceded by the 1993 Agreement.

Uncontradicted testimony presented at the September 9, 2003, hearing established these as the only agreements entered into between Debtor and Bright.

Bright objected to the rejection of its agreements with Debtor and filed a proof of claim in the amount of $47,470,285.00, representing the damages Bright estimated it would suffer if the 1993 Agreement were not performed. Debtor, in turn, timely objected to Bright's claim, though CFC did not.

Following negotiations between Debtor and Bright, Debtor submitted the Motion by which Bright's claim is to be allowed in the amount of $5,635,963.22. At the September 9, 2003 hearing, Bright withdrew its objection to Debtor's rejection of the 1993 Agreement. During the hearing, CFC brought out that Debtor and Bright had entered into a new agreement for Debtor to provide electrical service to Bright (the "Service Agreement"). Under the Service Agreement, the electrical lines that were to be buried by Debtor pursuant to the 1993 Agreement will still be buried. However, because the Service Agreement is subject to a more recent tariff than was the 1993 Agreement, the cost of burying the lines will be borne by Bright. Debtor's estimate of that cost – which must be paid to Debtor by Bright – is, interestingly, $5,635,963.22.

II. CFC's Objection

CFC, not unreasonably, is less than happy with the Motion. Had Debtor assumed the 1993 Agreement, it would have borne the cost of burial of Bright's electrical lines. By Debtor's rejection of the 1993 Agreement, so turning Bright's damages into an unsecured claim, CFC is caused to pay to Bright the cost of burial, which Bright will then pay to Debtor pursuant to the Service Agreement. With the exception of Bright's attorney fees and an indeterminate claim

Bright might have by reason of easements granted to Debtor pursuant to their earlier agreements, Debtor, by the Motion, proposes to shift to CFC a cost it would have borne but for its chapter 11 case and the Plan.

CFC asserts three objections in opposition to the Motion. First, it argues that notice of the proposed rejection of the 1993 Agreement was inadequate. CFC notes that the rejection motion was so unclear that even Debtor's witnesses were not sure whether it was rejection of the 1985 Agreement or the 1993 Agreement that gave rise to Bright's claim.

Second, CFC points out that the settlement agreement appended to the Motion purports to be the entire agreement between Bright and Debtor, yet a principal of Bright, C.R. Bright, testified that Bright would not have settled absent the Service Agreement. CFC maintains that Debtor fraudulently concealed the existence of the Service Agreement from it and the court. Thus, CFC urges, the Motion must be denied.

Finally, CFC complains that the Motion should be denied as not in the best interest of creditors and Debtor's estate. In this area of dispute the parties argue over what standard is applicable to approval of the Motion and rejection of the 1993 Agreement.[2] The court questions whether the standard applicable to pre-plan actions by a debtor is that which should be used in evaluating the Motion, which must be considered in the context of a confirmed plan which has

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[2] On the one hand, CFC argues that this court should only approve a settlement that is fair and equitable and in the best interest of the estate. *See Rivercity v. Harpel (In re Jackson Brewing Co.*, 624 F.2d 599, 602-603 (5th Cir. 1980) and *U.S. v. AWECO (In re AWECO)*, 725 F.2d 293, 298 (5th Cir. 1984). On the other hand, Debtor insists that the standard to apply is the "business judgment" test. *See Tex. Health Enter., Inc. v. Lytle Nursing Home (In re Tex. Health Enter., Inc.)*, 2003 U.S. App. LEXIS 15490, at *7 (5th Cir. July 31, 2003).

been consummated and pays creditors in full. While this is an interesting issue, for the reasons discussed below, the court need not reach it in order to decide the Motion.

III. Discussion

A. CFC's Procedural Objections

Though, strictly speaking, the alleged concealment of the Service Agreement is not attacked as a procedural defect, because it relates to whether CFC was properly notified of the settlement terms underlying the Motion, the court will consider it together with the question of whether the notice of rejection of the 1993 Agreement was adequate. The discussion in part II.B is also pertinent in disposing of these matters, since, for the reasons there given, CFC should be viewed by the court for notice purposes as a co-proponent of the Plan rather than in its capacity as a creditor. Thus, even if the court's analysis of procedural issues is deficient, CFC's objections would fail for want of a protectible economic interest.

1. Notice

Turning first to the question of notice of Debtor's motion to reject the 1993 Agreement and the 1985 Agreement, CFC argues that the two contracts were included in an "omnibus" motion to reject, and were so poorly described that Debtor's officer, Curtis Trivitt, could not identify which was the agreement binding Debtor to bury the electrical lines in question. Moreover, according to CFC the rejection motion, by failing to show an estimate of rejection damages, did not give it sufficient notice of the likely cost of rejection.

Notice of a motion to reject a contract is governed by FED. R. BANKR. P. 6006(c) which states:

> Notice of a motion [to reject a contract] shall be given to the other party to the contract . . . , to other parties in interest as the court may direct, and . . . to the United States trustee.

Neither Rule 6006 nor any other rule specifies the timing or the content of notice of a rejection motion.

In the case at bar notice was transmitted to CFC. Clearly the notice was sufficient for Bright - the party with which Rule 6006(c) is principally concerned. *See In re Golden Books Family Entertainment, Inc.*, 269 B.R. 300, 305 (Bankr. D. Del. 2001) (outlining implication of Federal Rules of Bankruptcy Procedure 9014 and 7004 requiring reasonable notice for proceedings brought pursuant to Rule 6006). The fact that the parties all appeared before the court on September 9, 2003, to argue over the Motion suggests notice of the underlying rejection was sufficient.

Notice – and timing – of rejection was consistent with the requirements of the Plan. Under ¶ 10.1 of the Plan a motion to reject only had to be "[f]iled and served by the Debtors on or before the Confirmation Date." This provision, a part of the Plan of which CFC was itself a proponent, was complied with. The court is not prepared to suppose that CFC's counsel, which has done an outstanding job in representation of CFC in this case, would not have been alert to the chance that a provision of the Plan, in the drafting of which such counsel surely participated, would be turned against their client.[3] The court thus rejects the argument that notice of the rejection of the 1993 Agreement was inadequate.

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[3] No doubt CFC knew Debtor had but two contracts with Bright. CFC was familiar with developer contracts, and has not suggested the agreements with Bright were concealed from it during its due diligence. Two contracts with Bright were rejected. Ergo, CFC was necessarily apprised that the 1993 Agreement here at issue was rejected.

2. Concealment of the Service Agreement

While the court is not prepared to assign to Debtor and Bright the nefarious motives CFC would impute to them, the failure to refer to the Service Agreement in the Motion or the underlying settlement agreement was either a little too clever or a little too sloppy. Clearly (as testified by C.R. Bright), the Service Agreement was a necessary prerequisite to Bright's willingness to settle. The settlement agreement was thus misleading in that it failed to mention the Service Agreement and, in fact, included a term which suggested it was independent of any other dealings between Debtor and Bright.

Nevertheless the court is not prepared to infer fraudulent concealment or collusion from the facts before it. Bright's property is in an area where Debtor is one of only two certificated electric utility providers. Debtor was the owner of existing electrical infrastructure at Bright's development which only Debtor, according to Curtis Trivitt, could remove, replace or modify. CFC, in the business of financing rural utility cooperative, certainly knew this. From that knowledge it is one very short step to the conclusion that Bright would enter into a new agreement with Debtor for service. From other litigation in this case,[4] CFC should have been aware of Debtor's currently applicable tariff regarding burial of electrical lines.

In short, if Debtor and Bright planned to slip something by CFC by failing to mention the Service Agreement, they knew they could only succeed if CFC was inattentive. In fact, CFC was

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[4] *See Denton County Elec. Coop. v. Eldorado Ranch, Ltd. (In re Denton County Elec. Coop.)*, 2003 Bankr. LEXIS 298 (Bankr. N.D. Tex. Apr. 8, 2003); *Denton County Elec. Coop. v. Eldorado Ranch, Ltd. (In re Denton County Elec. Coop.)*, 2003 Bankr. LEXIS 302 (Bankr. N.D. Tex. Feb. 18, 2003); *Denton County Elec. Coop. v. Eldorado Ranch, Ltd. (In re Denton County Elec. Coop.)*, 281 B.R. 876 (Bankr. N.D. Tex. 2002).

not inattentive. As soon as it undertook discovery in connection with the Motion it established the existence of the Service Agreement.

B. Standard for Approval

As mentioned above the parties have a significant disagreement over what standards should be applied by this court in, first, determining whether to authorize the rejection of the 1993 Agreement and, second, deciding the Motion. After careful review the court concludes that the tests for granting or denying a motion to reject a contract and for approving a settlement are inapplicable in the instant case. Both the context in which the Motion is before the court and the manner in which CFC is economically aggrieved dictate a different approach.

1. The Context of the Motion.

In the case at bar, the Plan has been confirmed. Property of the estate has revested in the Debtor. 11 U.S.C. § 1141(b); Plan, ¶ 12.3. As the estate no longer exists, the "best interests of the estate" has no relevance to deciding the Motion.

As for the "best interest of creditors," unsecured creditors (typically the concern of the court) (*see In re J. Howard Marshall*, 2003 Bankr. LEXIS 1002, at *20 (Bankr. C.D. Cal. Aug. 26, 2003); *In re Dow Corning Corp.*, 2003 Bankr. LEXIS 787, at *3 (Bankr. E.D. Mich. July 17, 2003)), have been or will be paid in full with CFC's dollars. Disposition of the Motion and allowance of Bright's claim will have no effect on payment of any other unsecured claims.

CFC, in its capacity as a creditor, is actually benefitted by shifting the cost of performance from Debtor to CFC in its capacity as a proponent of the Plan. Payment of Bright's claim by CFC will not increase Debtor's indebtedness to CFC (i.e., CFC's claim). On the other

hand, relieving Debtor of the cost of performing the 1993 Agreement while affording it the profits of the Service Agreement will enhance the probability that CFC, as a creditor[5], will be paid, since payment of CFC is dependent on Debtor's earning capacity (Plan, ¶ 4.2 and implementing documents, Plan ¶ 1.1.20), a capacity improved rather than harmed by the settlement with Bright. It is only through the unexpected increase in its cost of performing its obligations under the Plan that CFC is, in fact, aggrieved.

2. Rights and Remedies

Consequently, in the case at bar CFC's rights and remedies vis-a-vis Debtor must be measured not based on its status as a creditor but rather against the agreements made by CFC and Debtor that resulted in the Plan. As a proponent of the Plan, CFC does not look to the Bankruptcy Code to protect it against Debtor's conduct. It must rely on the operative documents defining its relationship with Debtor. *See New Nat'l Gypsum Co. v. Nat'l Gypsum Co. Settlement Trust (In re Nat'l Gypsum Co. and Aancor Holdings Inc.)*, 219 F.3d 478, 482-83 (5th Cir. 2000). It is not to the Debtor as a fiduciary for creditors, holding an estate in trust, that CFC, co-proponent of the Plan, looks for the performance it is due. It is from Debtor as a party with which CFC contracted that CFC must seek recourse.

The parties did not present the court with argument regarding the division of rights and responsibilities between the proponents of the Plan. However, the court has reviewed the operative documents – the May 2, 2002 agreement, the Plan and the attachments to the Plan. It

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[5] A creditor is an entity with a claim. 11 U.S.C. § 101(5) and (10); Plan, ¶¶ 1.1.22 and 1.1.42. CFC's claim does not include amounts advanced in payment of unsecured claims (Plan, ¶ 1.1.21). Thus it suffers no harm as a *creditor* by reason of its payment of Bright as a proponent of the Plan (Plan, ¶ 8.1).

appears to the court that Debtor has not acted contrary to any obligation to CFC under those documents.

Actually, the Plan appears to be the only document pertinent to the court's analysis. In construing the Plan, the court must use the same techniques it would in deciphering the meaning of any contract. *See Official Creditors Comm. of Stratford of Tex., Inc. (In re Stratford of Tex., Inc.)*, 635 F.2d 365, 368 (5th Cir. 1981).

The Plan on its face reflects both Debtor and CFC as its proponents and is endorsed by counsel for each. Officers of Debtor and CFC and those entities' respective counsel signed the Plan. The Plan imposes duties on and accords rights not only to Debtor but also to CFC. *See, e.g.,* Plan, ¶¶ 2.1.3, 7.4, 7.8, 7.9.1.2, 8.1.2, 8.6, 12.4., Art. XIII. In a number of instances, the Plan provides action may be taken by either CFC *or* Debtor. *See, e.g.*, Plan, ¶¶ 5.1.1 (only Debtor or CFC may object to claims), 15.2 (Debtor or CFC may revoke the Plan), 16.4 (defaulting plan proponent). On the other hand, there are numerous provisions in the Plan that require Debtor *and* CFC to act jointly. *See*, e.g. ¶¶ 5.1.3 (distribution on undisputed portion of claim), 6.2 (request for confirmation under 11 U.S.C. § 1129(b)), 9.2 (escrow for disputed claim), 11.1 (confirmation order must be satisfactory to both), 15.1 (plan modification).

The inclusion in the Plan of provisions that require joint action or permit action by either Debtor or CFC indicate the drafters consciously did so when they specified that a duty, power or responsibility was to be exercised by Debtor alone. Paragraph 10.1 provides that contracts will be assumed pursuant to the Plan except such contracts as "are the subject of a separate motion pursuant to section 365 of the Bankruptcy Code to be [f]iled and served by the Debtor on or prior to the Confirmation Date." The drafters of the Plan could have shared this responsibility

between Debtor and CFC or might have made it a duty of Debtor to obtain CFC's approval for rejection of contracts. They did not.

Debtor, in rejecting the 1993 Agreement, was acting consistently with its rights and obligations under the Plan. Paragraph 10.3 of the Plan supports this conclusion, as that provision requires service upon CFC as well as Debtor of claims for rejection damages. Moreover, as noted above, ¶ 5.1.1 provides that "Debtor and CFC shall have sole authority to make and [f]ile objections to Claims." In short, as a proponent of the Plan and through its agreements with Debtor in that capacity, CFC has no reason to complain of Debtor's rejection of the 1993 Agreement.

The same reasoning applies to the compromise between Debtor and Bright. Paragraph 12.3 of the Plan states, in part, "from and after the Effective Date, each of the Reorganized Debtors may . . . settle and compromise Claims . . . without supervision of the Bankruptcy Court free of any restrictions of the Bankruptcy Code . . . subject to the terms and conditions of this Plan."[6] The Effective Date of the Plan has passed (¶¶ 1.1.48 and 11.2). The term "Reorganized Debtor" is not defined to limit Debtor's powers under ¶ 12.3 (¶1.1.79). Thus, again, the parties might have, but did not, give CFC a role in compromising claims including the Bright rejection claim. The court has found nothing in the Plan (other than CFC's right to object to a claim, not applicable here) that would limit Debtor's authority vis-a-vis its co-proponent, to enter into its compromise with Bright.

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[6] This provision not only obviates consideration of bankruptcy law in evaluating the settlement between Debtor and Bright. It raises a question about the limits on the authority the court has in evaluating the Motion.

IV. Conclusions

Unforseen consequences of agreements sometimes provide to a party benefits not originally contemplated. That appears to be the case here. The next instance of deciding an unanticipated question under the Plan or accompanying documents may redound to CFC's benefit.

In this case, the result must be approval of the Motion.

Debtor is directed to prepare and present an order in conformity with this Memorandum Opinion.

Signed this the 6th day of October 2003.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE